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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 895

MICHAELS ENTERPRISES, INC., and
JAMES A. MICHAELS, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in this case on January 11, 1965.

OPINION BELOW.

The opinion of the Eighth Circuit, App. B infra, January 11, 1965, is not reported. A prior opinion of the Eighth Circuit is reported at 321 F. 2d 913, App. A, infra. This Court granted certiorari, vacated the judgment and remanded per curiam, 376 U. S. 359, 84 S. Ct. 783 (1964).

JURISDICTION.

The judgment of the Court of Appeals was entered on January 11, 1965, after remand by this Court. The jurisdiction of this Court is invoked under 26 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Where the jury convicts on two counts under Title 26, U. S. C., § 5603 (b), of both failing to keep and failing to produce records, can the conviction for failing so to produce stand; and should the Eighth Circuit have answered this question under this Court's prior mandate in this case?

2. Under the "due process" clause of the Fifth Amendment to the Federal Constitution, may a person be convicted of a crime, imprisoned for a term of one year and fined $1,000.00 where he acted without criminal intent?

3. Whether Title 26, U. S. C., § 5603 (b) (5), carrying a maximum penalty of one year of imprisonment and $1,000.00 fine, is to be construed as having eliminated the element of criminal intent from the crime of failing to produce documents, where the predecessor statute, relating to failure to produce, § 5692, I. R. C. of 1954 (which carried a maximum penalty of a $25.00 fine) was previously construed to contain criminal intent as an element of the offense?

STATUTES INVOLVED.

26 U. S. C. 5124: (a) **Receipts**—Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received,

or shall keep all invoices of, and bills for, all distilled spirits, wines and beer received.

26 U. S. C. 5146: (a) **Preservation and inspection of records**—Any records or other documents required to be kept under this part or regulations issued pursuant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may, by regulations, prescribe and shall be kept available for inspection by any internal revenue officer during business hours.

(b) **Entry of premises for inspection**—The Secretary or his delegate may enter, during business hours, the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U. S. C. 5603: (a) **Fraudulent noncompliance**—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, transcript, or other document, who, with intent to defraud the United States, shall—

(1) fail to keep any such document or to make required entries therein; or

* * * * * * * * *

(5) fail or refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;

or who shall, with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) **Failure to comply**—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, transcript, or other document, who, otherwise than with intent to defraud the United States shall—

(1) fail to keep any such document or to make required entries therein; or

* * * * * * * * *

(5) fail or refuse to preserve or produce any such document as required by this chapter or regulations issued pursuant thereto;

or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense.

Sec. 5620, Internal Revenue Code of 1954:

Penalty and forfeiture for false or omitted entries in distiller's books and records.

Whenever any false entry is made in, or any entry required to be made is omitted from the records required under Section 5197 (a) (1) with intent to defraud or to conceal from the revenue officers any fact or particular required to be stated and entered in such records, or to mislead in reference thereto; or any distiller omits or refuses to provide such records, or cancels, obliterates, or destroys any part of such records or any entry therein, with intent to defraud, or permits the same to be done, or willfully refuses to produce such records when required by any revenue officer, the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States. And every person who makes such false entry, or omits to make

any entry required to be made, with intent aforesaid, or who causes or procures the same to be done, or fraudulently cancels, obliterates, or destroys any part of said records, or any entry therein, or willfully fails to produce such records, shall be fined not more than $5,000, and imprisoned not more than 2 years.

Sec. 5621, Internal Revenue Code of 1954:

Penalty relating to records and returns of distiller as wholesaler dealers, rectifiers, and wholesale dealers.

Every distiller, rectifier, and wholesale liquor dealer who refuses or neglects to keep the records required under Sections 5197 (a) (2), 5285 (b) or 5114 (a) in the form prescribed by the Secretary or his delegate, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not more than $5,000, and imprisoned not more than 3 years. Every distiller, rectifier, and wholesale liquor dealer who refuses or neglects to render transcripts or summaries of such records in the form required by the Secretary or his delegate shall, upon conviction, be fined not more than $100 for each such neglect or refusal.

Sec. 5692, Internal Revenue Code of 1954:

Penalty relating to records of retail liquor dealers.

For each willful violation of the provisions of section 5124 the retailer shall be subject to a fine of $25.

STATEMENT.

The petitioners, Michaels Enterprises, Inc., and James A. Michaels, Jr., its president, were charged in a two-count indictment. The first count alleged that the corporation was "a person required to keep and file records, returns, reports, summaries, transcripts and other documents," and that on August 30, 1961, the petitioners "did fail and refuse to preserve and produce such documents as required to be kept" by law when so demanded for inspection by investigators of the Alcohol Tax Unit (T. 249-250).

The second count charges that the corporation was "a person required to keep and file records, returns, reports, summaries, transcripts and other documents," and that the petitioners, between August 29, 1959, and August 31, 1961, "did fail to keep such documents and make required entries therein, to-wit, a record in book form of all distilled spirits, wines and beer received, or, in the alternative, to keep all invoices of, and bills for, all distilled spirits, wine and beer received by" the petitioner corporation (T. 250-251).

The evidence adduced by the Government may be summarized as follows: On August 29, 1961, investigators of the Alcohol and Tobacco unit went to Michaels Bar and Restaurant to conduct an inspection (T. 18). Petitioner Michaels was not present (T. 20), being on vacation (T. 43). The bartender told them that he did not know where the liquor invoices were kept (T. 23), and that he did not have a key to the basement (T. 22, 23). Petitioners' attorney told them that petitioner Michaels would return from vacation the next day (T. 24, 45), and asked them to then complete their inspection (T. 24, 47).

The next day, August 30, the inspectors returned (T. 25, 76) and asked petitioner Michaels for invoices of liquor purchases, who replied that he would have to dig them

up (T. 25, 28). He unlocked the basement, except one room, which they inspected (T. 26, 29). He stated that he did not have a key to the locked room (T. 28), but would see his lawyer and return with a key (T. 30). Although the inspectors received a telephone call from petitioners' attorney (T. 30, 48), petitioner Michaels did not return that day and the inspectors remained until midnight (T. 30, 77).

Early the next afternoon petitioner and his attorney arrived and admitted the inspectors into the locked room (T. 67-68). One cardboard box containing 37 liquor invoices was found in the basement proper, but not in the locked room, on top of some old furniture (T. 56, 68). No more invoices could be found and petitioner told them that they had been damaged in the basement flood and destroyed (T. 36, 50-51, 61-62, 82). From the 37 invoices, the inspectors recorded the names of the liquor companies from which petitioners purchased liquor (T. 61, 73, 79). They completed the inspection that day (T. 81) and never did request any additional information or invoices (T. 83). The Government adduced evidence from such wholesale liquor dealers as to petitioners' liquor purchases (T. 84-116), as they are required to maintain records of all sales (T. 88).

The petitioners adduced extensive evidence. Petitioner Michaels testified that he didn't know of the requirement to save the invoices for the Federal Government (T. 202),[1] but it was his practice to keep them for bookkeeping purposes (T. 202-203).

When whisky, as well as other supplies, was delivered to the establishment someone would sign the invoice (T.

[1] Nor was there any evidence to the contrary, that is, that the defendant Michaels had been previously informed of this requirement. Moreover, the evidence was undisputed that the defendants kept good books which set out all of their purchases, refuting any inference that the defendants were attempting to hide their purchases of whisky (T. 235).

131-132, 198) with the copy being placed on the back bar (T. 139-141, 199). Once or twice a month the accountant picked up the current invoices, check stubs, etc. (T. 163-168, 200). He kept the permanent records for the business, for convenience, as is customary, at his office (T. 165, 170, 174). After the entries were made in the permanent books (T. 163-168, 170, 174), the initial records including invoices, were returned to the Restaurant (T. 167). Among the books was a disbursement journal, which recorded all purchases of liquor by check number, date paid, payee (company from which purchased), and class of purchase, such as food, liquor, supplies, etc. (T. 163-164, 168, 169). The journal was introduced into evidence by the defense (T. 169).

Petitioner Michaels testified that on June 23, 1961, water backed into the basement from the sewer to a level of two to four inches (T. 194-195), damaging the bills and invoices, which were later destroyed (T. 195-197). He was corroborated by the maintenance superintendent of the building (T. 146-160). The sewer problem was repaired by the Dependable Plumbing Company (T. 197), corroborated by their records (T. 142-145).

Petitioner, corroborated by his wife, testified that on August 27, 1961, the family drove to their farm about 100 miles from St. Louis (T. 124-125, 183, 188), returning on August 30 (T. 126, 184). Upon arriving at the restaurant about 4 p. m. (T. 126, 184), two inspectors were present who asked to inspect liquor invoices and the basement (T. 184-186). After inspecting the basement, petitioner Michaels told the inspectors that he could not find the key to the locked room, and that the invoices may have been destroyed in the flood (T. 121-122, 185-187). The inspector asked petitioner Michaels to go after the key (T. 187). The key could not be found at his home (T. 126, 187), and petitioner and his wife drove to the farm where it was

found in a coat which he had left there (T. 126-127, 187-188). The key was delivered to the inspectors at the restaurant the next day (T. 190). The invoices were not in the room (T. 205), and petitioner again explained that they had been destroyed in a flood (T. 191). The inspectors never requested any other records (T. 201).

On rebuttal, the government adduced testimony that certain invoices were missing at the time of the inspection which would have been received by petitioners from wholesalers after the flood (T. 207-212, 225-226). The court below was in error in stating that "at the trial of this case, certain 'invoices' for distilled spirits were introduced into evidence by appellants" (App. 7), as petitioners did not introduce any invoices (T. 11). Nor was there any evidence, contrary to the statements of the Court below (App. 8), that any invoices existed other than the 37 which were inspected.

The instructions did not contain any verdict-directing instruction nor any instruction setting forth the elements of the offense. The Court simply read the various statutes involved and the indictment (T. 247-251) and gave an instruction, offered by the defense, on accident (T. 251-253). There was no instruction on intent. The only reference even to the word "knowingly" was in stating the Government's position, not the elements of the offense (T. 251). Shortly after the jury retired to deliberate, it requested the exhibits showing sales invoices from the various liquor dealers and a "copy of the law stating the manner in which the liquor records pertaining to sales and purchases should be kept" (T. 258-259). The Court reread all of the instructions (T. 262-275).

The jury returned a verdict of guilty on both counts as to both petitioners. Petitioner Michaels was sentenced to imprisonment for one year on Count I, and each petitioner was fined $1,000.00 on each count (T. 277-278).

THE FIRST APPEAL AND REMAND BY THIS COURT.

Petitioners appealed to the Eighth Circuit from the judgment and sentence on both counts. Judge Ridge wrote the opinion affirming on both counts. 321 F. 2d 913 (App. A).

Petitioner raised in his first appeal, *inter alia*, that it was plain error for the trial court to fail to instruct on intent, the indictment was insufficient to inform the defendants of the charge against them, that the convictions could not stand because petitioner could not be convicted both for failing to keep records and for failing to produce the same records, and that the evidence as to intent was insufficient to sustain the verdict (App. A 3). The Eighth Circuit held on these issues that intent was not an essential element of the offense and therefore it was unnecessary to instruct on intent (App. A 4). It failed to discuss the sufficiency of the indictment or the propriety of convictions for both failing to keep and failing to produce the same. The Court failed to discuss cases cited by appellant decided under predecessor statutes which held intent to be an essential element of the offense. The Eighth Circuit refused to pass on the sufficiency of the evidence because it claimed no motion for judgment of acquittal was filed (App. A 8). (In fact, such a motion was filed as this Court pointed out when it remanded the case.)

Petitioner then applied to this court for a writ of certiorari. Petitioner raised the propriety of the Eighth Circuit ruling that intent was not an element of the offense, and that convictions could stand for both failing to keep and failing to produce records. The thrust of petitioners' contention was that since the evidence showed that they failed to keep the records, the conviction on

Count I for failing to produce records could not stand. The government in opposition, contended that the evidence showed that some records were not kept and that others that were kept were not produced, and therefore both counts could stand (Gov. Br. in Opposition 7-8). This Court in a *per curiam* opinion vacated and remanded the case stating:

> "The critical issue, as we see it, is whether the record contains sufficient evidence of violations of the two counts to support the imposition of nonconcurrent sentences. The Court of Appeals for the Eighth Circuit refused to consider the question of sufficiency of the evidence to support the verdict, on the ground that petitioners did not move for an acquittal at the close of all the evidence. 321 F. 2d 913, 917. The record clearly shows, however, that petitioners did move for 'judgment of acquittal at the close of all the evidence,' as well as 'at the close of the government's case.'"
>
> "The writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for consideration of the sufficiency of the evidence."

We respectfully submit that, instead of complying with this Court's mandate, the Eighth Circuit neatly avoided it. The Eighth Circuit, Judge Ridge again writing the opinion, ruled that the evidence was insufficient on Count II and reversed it outright, while affirming on Count I.[2]

The effect of this was to avoid the question this Court asked the Eighth Circuit to decide. The question was whether a conviction could stand for both failing to keep

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[2] Count I charging failure to produce records carried a sentence of one year plus a $1,000.00 fine. Count II, reversed by the Eighth Circuit, carried only a $1,000.00 fine.

and failure to produce records. By finding that the evidence was insufficient to show that petitioners failed to keep the records, the Circuit Court could then say the petitioners did not produce records which they kept.

However, at no time did petitioners claim that the evidence was insufficient on Count II. The prosecutor who tried the case made this his strongest argument, i. e. that petitioners failed to keep the records (T. 235, 238, 244). The Solicitor General in opposing the previous grant of certiorari stated: "[T]he evidence was more than adequate for the jury to find that some invoices were not kept, and others were kept and not produced . . . The jury could properly infer that those invoices had not been kept" (Gov. Br. in Opposition 7-8). At no time did the government contend that the evidence on Count II was insufficient.

REASONS FOR GRANTING THE WRIT.

1. **The Eighth Circuit did not comply with this Court's mandate; despite the Eighth Circuit's disposition of the case, the question still remains whether the jury having convicted for failing to keep certain records, a conviction for failing to produce those records can stand.**

This Court remanded previously to determine "whether the record contains sufficient evidence of violations of the two courts to support the imposition of nonconcurrent sentences." 376 U. S. at 357, 84 S. Ct. at 783. The Eighth Circuit neatly avoided dealing with this question by finding the evidence insufficient on Count II (charging failure to keep) and by affirming on Count I. But, no one ever claimed the evidence on Count II was insufficient, i. e., that there was not evidence that petitioners failed to keep the records. The Government's main theory was to the contrary. And we submit the evidence is to the contrary.

The question raised by petitioners was whether Count I, charging failure to produce, could stand since the evidence showed the records were not kept.

Normally we would not attempt to burden this Court with matters relating to evidence, but the record is short, and we think a fair reading will show that the evidence on Count II was overwhelming, i. e., that the evidence showed that the records were not kept by petitioners, as all parties seemed to agree. (We wonder if the Court of Appeals would have found Count II insufficient had it, rather than Count I, carried the prison sentence.)

It is submitted that this Court's mandate cannot be avoided by the device employed by the Eighth Circuit. The jury convicted petitioners on Count II for failing to keep certain records. This verdict is amply supported by the evidence. The question is then whether the conviction on Count I can stand for failing to produce records, or in fairness, can a man be punished for failing to produce records he failed to keep? Cf. **Heflin v. United States**, 358 U. S. 415, 79 S. Ct. 451 (1959); **Milanovich v. United States**, 365 U. S. 551, 91 S. Ct. 728 (1961). The Eighth Circuit should have answered this question. Instead, and without justification it reversed Count II in order that Count I carrying the jail sentence could stand. It is submitted, then, that the case should be remanded for the Eighth Circuit to reconsider the question, or this Court should decide the question.

2. **The Eighth Circuit's holding that a man may be imprisoned for a period of a year although he acted without criminal intent raises serious questions in the administration of justice.**

Our system of criminal jurisprudence has traditionally divided crimes into two parts, the "actus rea", the guilty act, and the "mens rea", the guilty mind. It is the rule,

generally, that both elements are necessary to render a person guilty of a crime. **Morrisette v. United States**, 342 U. S. 246, 251-252, 72 S. Ct. 240, 243-244 (1952). Of course, there is a class of crimes for which "mens rea" or intent is not an element. But in these, "penalties are [commonly] relatively small and conviction does no grave damage to the offender's reputation." 342 U. S. at 256, 72 S. Ct. at 246.

We think the sentence of a year imposed here is not "relatively small" and since it is imposed absent intent, we think, and would argue if certiorari were granted, that it violates due process of law, i. e., that if the statute authorizes imposition of a sentence of one year in the absence of criminal intent, it violates due process of law.

There are many statutes that, although carrying a penalty of a year in jail or more, can be construed as eliminating intent. See, e. g., **United States v. Parfait Powder Puff Co.**, 163 F. 2d 1008 (7th Cir. 1947). Thus, the question is one that will likely arise in the future.

3. **The Eighth Circuit's holding that Title 26, U. S. C. § 5603 (b), does not require criminal intent raises serious questions as to the administration of this very important statute.**

The Eighth Circuit held that intent is not an essential element of the offense under Title 26, U. S. C., § 5603 (b) (App. A. 4). In doing so, the Eighth Circuit ignored cases dealing with Int. Rev. Code of 1954, §§ 5620, 5621, 5692, which were codified in Title 26, U. S. C., § 5603 (b). See, **One 1941 Buick Sedan v. United States**, 158 F. 2d 445 (10th Cir. 1946); **Brink v. United States**, 148 F. 2d 325 (6th Cir. 1945); **Keith v. United States**, 250 F. 2d 355 (10th Cir. 1957); **United States v. Monarch Distributing Co.**, 116 F. 2d 11 (7th Cir. 1940). In these cases, the Courts held that the predecessor statutes required intent.

It is interesting to note that prior to § 5603 (b), petitioners could only be charged under Int. Rev. Code, § 5692. This carried a maximum penalty of $25.00. Yet this statute was held to require intent. **One 1941 Buick Sedan**, supra. But, the Eighth Circuit has construed the successor statute which carries a penalty of one year in jail and a $1,000.00 fine as not requiring intent. This decision, we think, is an anomaly.

Such a construction does not necessarily follow from the language of § 5603 (b). The statute says:

> "Any person . . . who, otherwise than with intent to defraud the United States shall——".

Otherwise than with "intent to defraud," certainly does not negate all intent. Congress could have intended to punish willful conduct that fell short of "intent to defraud." Cf. **Spies v. United States**, 317 U. S. 492 (1943).

If petitioners are correct in their contention that intent is an element of the offense, then the case must be reversed because the information did not charge intent, **Russell v. United States**, 369 U. S. 749, 82 S. Ct. 1038 (1962), and because the trial court did not instruct on intent.[3] Further, it would be necessary to determine

Whether petitioners are right or wrong about intent being an element of the offense, a serious question is presented justifying certiorari.

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[3] The only instruction given by the trial court that could possibly involve intent is as follows:

> "It is the Government's position that on or about August 30, 1961 . . . [defendants] . . . knowingly failed and refused to preserve and produce documents and records . . ." (T. 251).

Nowhere does the trial court define "knowingly" or instruct the jury that it must find that petitioners acted knowingly.
whether there is evidence of intent.

CONCLUSION.

For the reasons stated hereinabove, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 17,137.

Michaels Enterprises, Inc., and James A. Michaels, Jr., Appellants,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 28, 1963.]

Before Vogel, Van Oosterhout and Ridge, Circuit Judges.

Ridge, Circuit Judge:

Appellants, Michaels Enterprises, Inc., a corporation, and James A. Michaels, Jr., its President, were convicted by jury verdict on both counts of an indictment charging, in Count I thereof, that the corporation was a retail dealer of distilled spirits, wines and beer, and "a person required to keep and file records, returns," etc., as required by Chapter 51, Title 26, U.S.C.A., and James A. Michaels, Jr., being its President "did fail and refuse to preserve and produce such documents so required to be kept" when demand for inspection thereof was made by investigators of

the Alcohol and Tobacco Tax Unit, all in violation of Section 5603(b)(5), Title 26, U.S.C.A. Count II charged the corporation as being a person required to keep and file such records, and Michaels, being its President, "for failing to keep such documents and make required entries therein, to-wit, a record in book form of all distilled spirits, wines and beer received, or, in the alternative, to keep all invoices of, and bills for, all distilled spirits, wines and beer received" by Michaels Enterprises, Inc., in violation of Section 5603 (b)(1), Title 26, U.S.C.A.

Sup-part E of Chapter 51, *supra*, imposes an "Occupational Tax" on "Retail Dealers" of distilled spirits, wines and beer. Section 5124(a)[1] thereof, relating to keeping of "records"; Section 5146(a)(b),[2] providing for the "preservation and inspection" thereof, and 5603(b)(1)(5),[3] imposing the penalty for failure to comply with the

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[1] "§ 5124. Records.

"(a) Receipts.—Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines, and beer received."

[2] "§ 5146. Preservation and inspection of records, and entry of premises for inspection.

"(a) Preservation and inspection of records.—Any record or other documents required to be kept under this part or regulations issued pursuant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulations prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

"(b) Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

[3] "(b) Failure to comply.—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, tran-

mandate of the above sections, are the applicable statutes here to be considered.

By this appeal the following assignments of error are presented:

(1) "It was plain error for the Court to fail to instruct on intent";

(2) "It was plain error for the trial Court to fail to instruct the jury on the elements of the offense, or to tell the jury what it must find in order to convict the defendants";

(3) "Count I of the indictment was insufficient to inform the defendants of the charge against them";

(4) "As the defendants were convicted (on) Count II for failing to keep records . . . their conviction on Count I for failing to produce records for inspection by agents (of the Alcohol and Tobacco Tax Unit, when requested) cannot stand, since they cannot be convicted of failure to produce that which they did not keep or have"; and

(5) "The evidence as to intent was insufficient to sustain the verdicts." (Par. added.)

No exceptions, as required by Rule 30, 18 U.S.C.A., were taken to the charge to the jury as given in this case. Appellants admit they "did not object to the failure of the (District) Court to instruct on intent. Indeed (they say)

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script, or other document, who, otherwise than with intent to defraud the United States, shall—

(1) fail to keep any such document or to make required entries therein; or

(5) fail or refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto; or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense."

the case was tried and argued (before that Court) on the theory that intent was not an element of the offenses." That such is and was the proper concept of the nature of the crimes for which appellants were indicted and found guilty is made manifest by these considerations. The statutes in question are regulatory measures enacted in the exercise of what is commonly called the police power, where emphasis is placed on a "knowing" violation thereof, rather than "intent" to commit an "omission of duty."

> "Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumes his responsibilities." **Morrissette v. United States**, 342 U. S. 246, 256 (1951).

Section 5603(b), *supra*, providing penalty for failure to comply with the record-keeping provisions of sub-part E of Chapter 51, *supra*, "otherwise than with intent to defraud the United States" is a regulatory measure, and lack of "intent" to violate the provisions thereof is not an essential element of the offense. **United States v. Behrman**, 258 U.S. 280 (1921); **United States v. Balint**, 258 U.S. 250 (1921). The statute creates a crime *mala prohibita* and not one *malum in se*. Lack of intent to violate the mandate thereof is no defense. **Morrissette v. United States**, *supra*; **Riss & Company v. United States**, 262 F.2d 245 (8 Cir. 1958); **Reyes v. United States**, 258 F.2d 774 (9 Cir. 1958); **United States v. Juzwiak**, 258 F.2d 844, 845 (2 Cir. 1958), *cert. den.* 359 U.S. 939. In the absence of "intent" from a statute such as 5603(b), *supra*, an implication of *scienter* is the most that may be inferred "where there is no reason to suppose the Congress, by deliberate

choice, omitted such requirement." **Delaney v. United States**, 199 F.2d 117 (1 Cir. 1952). The trial Court in the case at bar charged the jury as to the appellants' "knowing" violation of the applicable statutes. That being so, it was not error to "fail to instruct on intent" as appellants here assert.

The evidence relating to appellants' violations of the revenue laws, *supra*, is not substantially in dispute. Tersely stated and without reference to detail matter appearing in the record, it was established: . . . In August 1961, agents of the Alcohol and Tobacco Tax Unit went to Michaels Bar and Restaurant in St. Louis, Missouri, to make a retail liquor inspection and requested the bartender in charge to produce retail liquor "invoices" or records of all distilled spirits, wines and beer received by the corporate defendant for the previous two years. At that time, five or ten invoices were made available to them for inspection. They requested additional invoices, but were told the individual defendant, James A. Michaels, Jr., President of the defendant corporation, was not present but would return the next day. The agents returned the following day and requested defendant Michaels to produce for inspection the retail liquor records. He told them he would have to "dig them up" and that they should come back the next day. The agents returned the next day. At that time, thirty-seven retail liquor invoices were turned over to them for inspection by Michaels, only twenty of which were for the years 1959, 1960 and 1961. An additional request was made by the agents for any other invoice records. Defendant Michaels told them there were no others because they had been destroyed by a flood occurring in the basement of the premises. By other evidence, the Government established that during the critical period four hundred fifty transactions by wholesale liquor dealers were recorded as sales of distilled spirits, etc., made to the defendant corporation.

The evidence of appellants was to the effect that when distilled spirits, etc. were received at the defendant corporation's place of business, invoices therefor were placed on the back-bar until an accountant came and took them to his office to prepare financial statements of the corporation for income tax purposes. Subsequently, they were returned to the corporate defendant's place of business and stored in cardboard boxes in the basement. In June 1961, the basement was flooded and all such stored bills and invoices for distilled spirits received by the corporation got wet and as a result thereof were removed and destroyed because of their unsanitary condition. For that reason alone, defendants asserted they were unable to produce the required records for inspection. However, the evidence of the Government established that certain invoices for purchases of distilled spirits, wines and beer received by the defendant corporation after the occurrence of the basement flood were not produced for inspection when request therefor was made by the agents. No explanation for that anomalous situation was attempted by any evidence adduced by appellants.

It has been so often reiterated that failure to except to "the charge or omission therefrom" as given, "stating distinctly the matter to which (one) objects and the grounds of his objection" (Rule 30, F.R.Cr.P., 18 U.S. C.A.), presents nothing for appellate review, so far as the charge to a jury in a criminal case is to be considered, that fortifying authorities should not be necessary. But see, **Gendron v. United States**, 295 F.2d 897 (8 Cir. 1961); **Johnson v. United States**, 291 F.2d 150 (8 Cir. 1961); **Rizzo v. United States**, 295 F.2d 638 (8 Cir. 1961); **Wegman v. United States**, 272 F.2d 31 (8 Cir. 1959); **Rosenblcom v. United States**, 259 F.2d 500 (8 Cir. 1958), **cert. den.** 358 U.S. 929; **Davis v. United States**, 229 F.2d 181 (8 Cir. 1956), cert. den. 351 U.S. 904; **Kreinbring v. United States**, 216 F.2d 671 (8 Cir. 1954).

There is nothing vague about the record-keeping provisions of Chapter 51, Title 26, U.S.C.A. as they relate to "retail dealers in liquor" and the "preservation" of records by such dealers "for inspection by internal revenue officers during business hours," nor the penalty provided for failure to comply therewith. The charge as given to the jury in the case at bar was amply adequate to inform the jury as to the elements of an offense thereunder and "knowing" violation thereof. The charge specifically presented to the jury appellants' contention that if "the flooding of (the) basement and the . . . destruction of the records was caused by agencies or events entirely outside the control of (the) defendants" and for that reason their "inability . . . to produce (the) books and records on demand" was a result of that "fortuitous circumstance" etc., it "should acquit these defendants." In the light of the charge considered as a whole, there was no "plain error" therein as here asserted by appellants for the first time. Both counts of the indictment were couched in the mandate language of the applicable statutes, the provisions of which are concise, clear and basically simple. The citation of the specific provisions thereof was sufficient to inform the jury as to what facts it was required to find to establish the guilt of appellants. The defendants' contention that the jury was not sufficiently informed of what it should find to establish guilt of the charge made against them is without merit. It is sufficient for us because the District Court gave no erroneous direction thereby, absent a request for a more specific charge. **Stassi v. United States**, 50 F.2d 526 (8 Cir. 1931).

Concededly, the appellants failed to "keep" some of the documents and records they were required to maintain as provided in Sections 5124(a) and 5603(1) of Chapter 51, *supra*. At the trial of this case, certain "invoices" for distilled spirits were introduced into evidence by appellants. The contention was made that such were all the

invoices available to them which were not destroyed as a consequence of the flood. Evidence adduced by the Government was to the effect that some such exhibits introduced into evidence by appellants were not produced by them for inspection when requested by agents of the Alcohol and Tobacco Tax Unit at the time the agents appeared at the corporate defendant's premises. Hence, the evidence established that notwithstanding the contention made by appellants that some "invoices" kept by them were damaged by the flood, at the time of the inspection in question, they had other pertinent "invoices" in their possession which were not exhibited for inspection by the agents as required by the statutes, *supra*. Therefore, the evidence clearly established that appellants knowingly did not produce some invoices they did retain, for inspection when request therefor was made by the agents. **One 1941 Buick Sedan v. United States**, 158 F.2d 445 (10 Cir. 1946).

Appellants did not move for an acquittal at the close of all the evidence. No question of sufficiency of the evidence to support the verdict can now be made before this Court. **Rosenbloom v. United States**, *supra*.

The convictions appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 17,137.

Michaels Enterprises, Inc., and James A. Michaels, Jr., Appellants,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[January 11, 1965.]

Before MATTHES, RIDGE, Circuit Judges, and HANSON, District Judge.

RIDGE, Circuit Judge.

This case is again before this Court "for reconsideration of the sufficiency of the evidence" to sustain the "imposition of nonconcurrent sentences" for appellants' found violation of § 5603(b)(5) and (b)(1), Title 26, U.S.C.A.

After remand (376 U.S. 356) this appeal was unconditionally restored to the docket of this Court. Thereafter, "added briefs" were filed and rearguments made. Neither by added briefs nor at reargument do appellants in anywise impugn the previous disposition this Court made of

points 1, 2, 3, and 5, originally raised in this appeal. Manifestly, a reconsideration of such assignments of error are not within the ambit of remand of this case to this Court, *ante*. Consequently, we adhere to the disposition of appellants' assignments of error 1, 2, 3, and 5, raised in this appeal, as found at 321 F.2d 913.

Appellants' point 4, originally raised in this appeal, is set forth at page 915 of that opinion. In their "added brief" appellants restate that assignment thus:

> "Since there was no evidence that appellants failed to produce for inspection any invoices which were still in existence (at the time of the inspection hereinafter considered) their conviction on Count I (of the instant indictment) must be reversed. For simple justice dictates that they cannot be convicted of failing to produce that which they did not have." (Par. added.)

namely, the documents required to be kept on the premises of "every retail dealer in liquors" as provided in Chapter 51 of Title 26, U.S.C.A., Supp.

The presentation which the Government now makes to appellants' above contention is circumscribed by it as follows:

> "At most (under a given factual situation) it could be argued that the offense charged in Count II (of appellants' indictment), failure to keep records, is included in, and duplication of the offenses charged in Count I (thereof), failure to 'preserve and produce' records required to be kept. Should the evidence show that only records not kept were not produced, then the proper procedure would be to vacate the sentence under Count II. *Prince v. United States* (1957), 352 U.S. 322. However, should the evidence show that some records were not kept, and that some were in fact kept but not produced, then the conviction (of appellants) on both counts (of the instant indictment) was proper." (All par. after first one noted added.)

As a consequence of the foregoing, some clarification and enlargement of the factual statements found in our previous opinion must be made.

Before doing so we think it should be pointed out that appellants in this appeal have not heretofore contended before this Court that the evidence adduced at their trial, *qua* evidence, was insufficient to sustain their convictions on either count of their indictment. On the contrary, the only attack they make on their convictions has been legally, not factually, premised. That is to say, appellants' contention in this appeal is, and always has been, that since the jury found they did not keep invoices, books, and records on the business premises of Michaels Bar as they were required by law so to do, they cannot be convicted of failing to produce such records for inspection by agents of the Alcohol and Tobacco Tax Unit. Appellants' argument, as previously and now made in support of that contention, has singularly been premised in the rulings made in *Heflin v. United States*, 358 U. S. 415, 79 S. Ct. 451 (1959); *Milanovich v. United States*, 365 U. S. 551, 81 S. Ct. 728 (1961); and *Milanovich v. United States*, 275 F. 2d 716, 720 (4 Cir. 1960), where charges of "bank robbery" and "receiving stolen property" were considered to be concomitant offenses for which separate prosecutions could not be sustained under the Federal Bank Robbery Act, 18 U. S. C. A., § 2113. The very apparent distinguishment of the factual premise giving rise to the rulings made in the above-cited authorities, and the facts giving rise to appellants' prosecutions and convictions in the case at bar, is in our opinion sufficient to sap the foundation of any merit existing for the contention the appellants make, *ante*, and a mere statement thereof is all that need here be made.

Appellants, by point 5 as made in their original brief, did contend "the evidence as to intent" was insufficient

to sustain their convictions; but, as that matter was presented, disposition thereof was made as a matter of law, as appears at pages 915-16 of 321 F. 2d.

Appellants' prosecution under Count 1 of the indictment in the case at bar stems from their failure to produce for inspection by agents of the Alcohol and Tobacco Tax Unit, records which, as a retail dealer in distilled spirits, wines, and beer, Michaels Bar was required to keep and preserve at its place of business. Chapter 51, Title 26, United States Code, requires a retail dealer of distilled spirits to keep at its place of business in book form records, or invoices of all distilled spirits, wines and beer received (Section 5124, I.R.C. 1954, revised) and requires the dealer to preserve and produce same for inspection during business hours by agents of the Alcohol and Tobacco Tax Unit (5146 I.R.C. 1954, revised) when called upon so to do.

As made manifest in the previous opinion of this Court, such an inspection of records at Michaels Bar was first attempted to be made on August 29, 1961. The Government's evidence established that when agents of the Alcohol and Tobacco Tax Unit then appeared at Michaels Bar they identified themselves and made certain tests upon whisky situated at the bar. While doing so, one of them observed "between five and possibly ten" invoices on the back bar, near the cash register, but he did not then make an examination thereof. Later, the agents made request of the night manager who was then in charge of the bar, for all invoices or records as to distilled spirits received by Michaels Bar for the past two years. He told them he did not know where they were kept. Thereafter, the agents requested permission to make an examination of the basement of the premises, the door to which was locked. The night manager stated he did not have the key thereto. While the agents were then in the premises,

an attorney arrived at the bar and informed the investigators that the individual appellant was on vacation and if the agents would return the next day the individual appellant would return and they could complete their inspection.

The next day the agents again appeared at the premises of Michaels Bar, and made personal request of the individual appellant, who was President of the corporate appellant, to produce all invoices or a record of distilled spirits received at Michaels Bar for the past two years. At that time the individual appellant told the agents the invoices were around someplace, but he would have to "look them up." Thereafter, at the request of the agents, he unlocked the door to the basement proper and the agents made an inspection thereof. While so doing they noticed a room marked "Office", the door to which was locked. They asked Michaels for the key to the door. Michaels stated he did not then have a key to that room but he might be able to get one. The agents again asked Michaels to produce all records or invoices of distilled spirits received at the bar. After making conversation with the agents and a telephone call to some unidentified person, Michaels informed the agents that he did not think they had any right to inspect the premises or to request his invoices or records, and that he was not going to give them to the agents until he saw his attorney. He then left the bar premises and did not return, although the agents remained thereon until 11:30 P.M.

Early the next morning, the agents returned to the bar premises. That afternoon, petitioner and his attorney arrived at the premises. The agents again asked Michaels for all invoices for distilled spirits received at the bar for the past two years. Michaels produced the key to the "Office" in the basement, and the agents entered. Michaels told the agents he had to drive out in the County to get

the key, as he had left it at his farm when he was on vacation. The agents made an examination of the office and other parts of the basement proper, but found no invoices. They again requested Michaels to produce all the invoices he had. Michaels then went into a part of the basement proper and reached up on some stacked furniture and returned with a cardboard box containing miscellaneous papers. Only 37 invoices for distilled spirits purchased and delivered to Michaels Bar were among such papers. Twenty (20) of those invoices related to purchases and deliveries made to the bar from 7/12/61 to 8/22/61, a period of shortly more than one month after the flood hereinafter mentioned. The other 17 invoices were for the year 1958. When asked for any other invoices, Michaels told the agents he could not find any more. It was then that Michaels told the agents about a flood occurring in the basement of the bar premises in June 1961, and of damage to his records and invoices, along with other personal property, all of which was removed from the basement and destroyed because of a "health hazard." Thereafter, one of the agents examined the 37 invoices, *ante*, and made desired notations therefrom. Those invoices were then returned to appellant's possession. None of those invoices was introduced at the trial by appellants. After making a further inspection of the basement, the agents then left the premises.

The Government's evidence adduced at appellants' trial established, among other things, that appellants should have had in their possession 450 invoices for distilled spirits purchased and delivered to Michaels Bar during the two-year period prior to August 29, 1961. Copies of 69 invoices introduced into evidence by the Government established purchases and deliveries made to Michaels Bar after June 1961 and after the time of the flood above mentioned.

It is undisputed in the record of this case that when purchases of distilled spirits, wine, and beer were made and delivered to Michaels Bar it was the practice for the individual appellant, or some employee of the Corporation, to sign invoices for the same, receive a copy thereof, and place such document on the back bar, in the vicinity of the cash register, or a drawer thereof, and the same were so retained until they were delivered for bookkeeping purposes to a C.P.A. or someone from his office, who kept the books for Michaels Bar. Shortly after the books were posted, i.e., within two or three weeks' time, the invoices, along with other bookkeeping data, were returned to the place of business of the corporation.

It was the individual appellant's testimony that it was an invariable custom to "keep" and he did save all the documents returned to the corporation's place of business after the use thereof for bookkeeping purposes. This was done by "placing all of them in boxes" which were stored "downstairs" in the basement of the corporation's business premises. We think the only inference to be made from the record evidence is, that "all invoices of, and bills for, all distilled spirits, wines, and beer" that were ever "received" at the business premises of Michaels Bar were so kept. No contradiction appears in the record regarding the above established facts; nor this added fact, that a flood caused by defective sewers did occur in the basement of Michaels Enterprises, Inc.'s place of business in June 1961. Several minor floods had occurred in that basement prior to that date. Testimony in respect to such matter was affirmed by several witnesses. The individual appellant's testimony, also confirmed, was to the effect that all of the records, bills, and papers that were stored in the basement of Michaels Bar, along with other personal property, were so damaged by the June 1961 flood water and, solely because of the dam-

aged condition thereof, the same were removed from the basement and destroyed as undesirable trash because they created a health menace.

The Government's contention and argument made at appellants' trial was to the effect that evidence of the flood, *ante*, was adduced by appellants for the purpose of covering up the fact that the appellants did not keep some of the records which they were required by law to keep. However, from a close perusal of the record we do not think that such is a valid assumption that can here be made. The storage of invoices, revealing deliveries of distilled spirits to Michaels Bar, in the basement premises was amply affirmed by the testimony of witnesses other than appellant. Hence the very most that might reasonably be inferred from the evidence in this case is that it affords a basis for a conclusion that appellants were careless and negligent in undertaking to "keep" invoices for distilled spirits delivered to Michaels Bar by storing the same in the basement, as they did, with knowledge of probable flood occurring therein which would cause damage or destruction thereof. Be that as it is, we now consider the evidence here adduced as being insufficient to satisfy the quantum of proof necessary to establish criminal conduct on appellants' part for failure to "keep" records, as charged in Count II of the instant indictment. The reference in the previous opinion of this Court appearing at page 917 of 321 F.2d: "Concededly, the appellants failed to 'keep' some of the documents and records they were required to maintain as provided in Sections 5124(a) and 5603(b)(1) of Chapter 51," Title 26, U.S.C.A., was singly prompted by this Court's consideration of invoices that were damaged and destroyed as a result of the flood, *ante*.

Absent evidence that such "flood" did not occur, (and no attempt was made by the Government to contradict

that fact) there are no other facts appearing here from which it might be inferred that appellants "knowingly" failed to "keep" records as charged in Count II of their indictment. Fortifying authority is not deemed essential to sustain the proposition that an inadvertent, fortuitous, unintended happening of events should not be considered as a "knowing" failure to "keep" records so as to subject one to criminal punishment for having failed so to do.

The evidence adduced at appellants' trial did establish they should have had in their possession 69 invoices revealing sales and deliveries of distilled spirits, etc., to Michaels Bar after the flood. Only 20 invoices were produced by appellants for inspection of the agents. The individual appellant's testimony was to the effect that he clearly understood request was made of him to produce all sales invoices he had on the premises of Michaels Bar, showing delivery of distilled spirits thereat for a two-year period prior to August 29, 1961. On cross-examination, he testified as follows:

> "Q. Would all of the invoices for the past two months since that flooded condition you talked about, would all of those invoices have been in there?
>
> A. The ones that were located, the ones I just had there.
>
> Q. Where would the others be?
>
> A. Maybe they were in a drawer.
>
> Q. Didn't they ask you to give them all of the invoices you had?
>
> A. All they asked me to open that door, open the office door.
>
> Q. Now you misunderstood my question. Did they ask you to give them all of the sales invoices that you had?
>
> A. Yes, sir. Yes, they said to give us the invoices.
>
> Q. Did you give them all the sales invoices that you had?
>
> A. All that I had in that box there.
>
> Q. I am not talking about the box. I am talking

about all of the sales invoices. All of the sales invoices that you had on the premises.

A. I couldn't swear to that because I didn't go searching in drawers and that upstairs after that, actually.

Q. Didn't they ask you for all of the sales invoices you had at your establishment?

A. I guess that is the way he meant it, yes."

From the individual appellant's own testimony as given at the trial of this case, buttressed in part, as it was, by the testimony of the appellants' accountant as to the manner by which invoices were returned to Michaels Bar.[1] as well as that of other witnesses as to how invoices for distilled spirits delivered to the bar were receipted for and kept, we think the only reasonable conclusion to be reached is that appellants did "keep" all invoices of distilled spirits delivered to Michaels Bar prior to and after the time of the flood, *ante*, some of which they had in their possession relating to the period after the flood which they knowingly did not produce for inspection by the agents. From the operative facts above stated, we can now only determine that no competent probative evidence appears in this record from which it reasonably can be inferred that appellants "knowingly" failed to "keep" invoices which they were required to keep as provided in § 5603(b)(1) of Title 26, U.S.C.A. However, a very reasonable inference, fairly established beyond any reasonable doubt, is that some such invoices retained by appellants in their possession after the flood, were "know-

[1] The books of the corporation, at all times here considered, were kept and retained at the office of the C.P.A., and not at the place of business of the corporation as required by § 5124, T. 26, U.S.C.A. Such books were offered in evidence by appellants at their trial, but rejected by the trial court as being inadequate compliance with the mandate of that statute, since they did not contain information as to the quality and quantity of liquor purchased and delivered at the premises of Michaels Bar. No point is here made by appellants in respect to that ruling.

ingly'' not produced for inspection of the agents, in violation of § 5603(b)(5) of Title 26, U.S.C.A.

Therefore, the appellants' convictions on Count I of the indictment should be, and the same are, affirmed. Their convictions on Count II of such indictment are reversed.

• • • • • • • •

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 17,137. September Term, 1964.

Michaels Enterprises, Inc., and James A. Michaels, Jr., Appellants,
vs.
United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause having been remanded to this Court by the Supreme Court of the United States "for reconsideration of the sufficiency of the evidence" to sustain the "imposition of nonconcurrent sentences" of appellants, the appeal was unconditionally restored to the docket of this Court. Thereafter, this cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri; the additional briefs filed, and the reargruments of counsel for the respective parties.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgments of conviction of appellants of the District Court on Count II of the Indictment be, and the same are hereby, reversed.

It is further Ordered and Adjudged by this Court that the judgments of conviction on Count I of the indictment in this cause be, and the same are hereby, affirmed.

And it is further Ordered by this Court that the defendant in the District Court, James A. Michaels, Jr., do hereby surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not

now in custody, in execution of the sentence imposed upon him on Count I of the indictment, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

January 11th, 1965.

Order entered in accordance with Opinion:

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 895

MICHAELS ENTERPRISES, INC., AND JAMES A. MICHAELS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals on remand is not yet reported. The prior opinion is reported at 321 F.2d 913, and this Court's remand at 376 U.S. 356.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1965. The petition for a writ of cer-

tiorari was filed on February 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals complied with the mandate of this Court in 376 U.S. 356.

2. Whether the correctness of the instructions is before the Court and, if so, whether the trial court committed plain error therein with regard to the matter of criminal intent.

STATUTES INVOLVED

26 U.S.C. 5124(a) provides:

> (a) Receipts.
>
> Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines and beer received.

26 U.S.C. 5146(a) provides:

> (a) Preservation and inspection of records.
>
> Any records or other documents required to be kept under this part or regulations issued pursuant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulations prescribe, and shall be kept available for inspection

by any internal revenue officer during business hours.

26 U.S.C. 5603(b) provides in pertinent part:

> (b) Failure to comply.
>
> Any person required by this chapter * * * to keep or file any record, return, report, summary, transcript, or other document, who, otherwise than with intent to defraud the United States shall
>
> > (1) fail to keep any such document or to make required entries therein; or
> >
> > * * * *
> >
> > (5) fail [or] refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;
>
> or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense.

STATEMENT

Petitioners were indicted in the United States District Court for the Eastern District of Missouri for (1) failing and refusing to produce upon lawful demand documents required to be kept by retail liquor establishments, in violation of 26 U.S.C. 5603(b)(5), and (2) failing to keep such documents and make required entries therein between August 29, 1959, and August 31, 1961, in violation of 26 U.S.C. 5603(b)(1) (R. 1-3). They were convicted by a jury on both

counts. The court sentenced the individual petitioner to imprisonment for one year on count 1 and to a fine of $1,000 on each count. It sentenced the corporate petitioner to a fine of $1,000 on each count (R. 23-24, 37-38). The court of appeals affirmed, 321 F.2d 913 (Pet. App. A). This Court, noting that the court of appeals was under the misapprehension that petitioners had not moved for acquittal at the close of all the evidence, reversed *per curiam* and remanded the case for consideration of the sufficiency of the evidence, 376 U.S. 356. Upon remand, the court of appeals reversed the convictions of petitioners on count 2 and affirmed their convictions on count 1 (Pet. App. B).

1. THE TRIAL.

The evidence showed that on August 29, 1961, two agents of the Alcohol and Tobacco Tax Unit entered petitioners' bar in St. Louis and asked to examine invoices of purchases of alcholic beverages. There were some five to ten invoices on the back bar. The manager said that he had no key to the basement doors, which were locked, and that he did not know where the invoices were kept (Tr. 18-23). Petitioners' attorney later asked that the agents return the next day, when petitioner Michaels, president of the company bearing his name, would be available (Tr. 24).

On August 30, when the agents returned and asked Michaels for his purchase invoices on liquor, wine and beer, or a record of them, Michaels replied, "I will have to dig them up. They are around here some place" (Tr. 25). They went to the basement, but the

records were not found. A door marked "office" was locked and Michaels said he did not have a key. Michaels made several telephone calls and then told the agents he did not believe that they were entitled to inspect the premises. After one of them explained the law to him, Michaels said that he was going to see his lawyer and that he would obtain a key for the locked door. He left, at about 4:30 p.m. Petitioners' attorney called and was asked to communicate with Michaels. The agents waited until about 11:30 p.m., but Michaels did not return (Tr. 27-33, 66). Michaels, testifying for the defense, said that he had come in from his farm, about a hundred miles distant, and did not know yet where the invoices were; that he told the agents that "a lot of the stuff" had been "cleaned out" from the premises because it had become "wet and sloppy" in a flood (Tr. 185-187); that he returned to his farm and found the key in a coat pocket, and that he came back to town after midnight (Tr. 188-189).

On August 31, in the early afternoon, Michaels and his attorney were present at the bar, together with the three agents, who asked to complete their inspection. The agents were asked to wait awhile. After about a half hour they were allowed to enter the office, but found no invoices. Michaels then brought down a cardboard box from on top of some old furniture in another part of the basement and turned it over to the agents (Tr. 34-35, 56, 68). The box, together with two envelopes which were brought to the agent later, contained 20 liquor purchase invoices for the preceding two years, as well as 17 liquor invoices

which antedated that period (Tr. 68-73, 79). In answer to a request for the balance of the invoices, Michaels said he had no more and suggested that they had been destroyed by a flood (Tr. 61-62).

At the trial Michaels testified that the basement had been flooded six or eight times, and that on June 23, 1961, he called a plumbing company which made repairs. The invoices had been on the floor in cartons and were removed after the flood because of their damaged condition (Tr. 190-194). Records of the Dependable Plumbing Company confirmed the June 23 visit (Tr. 144). Another witness testified as to sewer trouble and flooding on the premises (Tr. 148-151, 153-154).

The government proved that 450 purchase invoices for liquor, wine and beer were received by petitioners over the two-year period covered by the indictment (Tr. 74-75, 86-89, 90-111; Pet. App. B 6). Michaels was shown some 69 delivery copies of invoices representing purchases by the establishment after June 23, 1961, and before August 31, for which he had failed to produce copies at the time of the inspection (Tr. 207-212; Pet. App. B 6). Michaels testified that they had no "set policy" about invoices. Any employee present would sign them. Once a month they would be picked up and sent with other information to the company's accountant. When he returned them, they would be placed downstairs in a box. He did not know he was required to keep them except for bookkeeping purposes, but he, in fact, always kept them. He had been in the tavern business since 1951 or 1952 (Tr. 198-203).

The court instructed that it was the government's position that petitioners "knowingly failed and refused to preserve and produce documents and records in book form or invoices" and that they "knowingly failed to keep and file" such records (Tr. 251). The court also instructed that if the jury should find that the books and records were damaged and destroyed by agencies or events entirely outside the control of these defendants, they should acquit (Tr. 252-253). There were no exceptions to the charge and no request for an instruction as to intent.

2. THE APPELLATE PROCEEDINGS.

On the first appeal, the court of appeals gave careful consideration to all assignments of error.[1] With regard to the claimed duplication of charges by the indictment, the court concluded that the evidence sub-

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[1] These were set forth in the opinion as follows (Pet. App. A 3).

> (1) It was plain error for the Court to fail to instruct on intent;
>
> (2) It was plain error for the trial Court to fail to instruct the jury on the elements of the offense, or to tell the jury what it must find in order to convict the defendants;
>
> (3) Count 1 of the indictment was insufficient to inform the defendants of the charge against them;
>
> (4) As the defendants were convicted (on) Count II for failing to keep records * * * their conviction on Count I for failing to produce records for inspection by agents (of the Alcohol and Tobacco Tax Unit, when requested) cannot stand, since they cannot be convicted of failure to produce that which they did not keep or have; and
>
> (5) The evidence as to intent was insufficient to sustain the verdicts. (Par. added.)

stantiated both the charge of failure to keep some records and the charge of wilful failure to produce other records actually preserved. The opinion erroneously stated, however, that appellants had not moved for an acquittal at the close of the evidence and, hence, that no question of the sufficiency of the evidence could be raised. This Court, finding the critical issue to be "whether the record contains sufficient evidence of violations of the two counts to support the imposition of nonconcurrent sentences" and pointing out that there had been a motion for judgment of acquittal, remanded to the court of appeals "for consideration of the sufficiency of the evidence." 376 U.S. 356, 357.

On remand, the court of appeals reached the conclusion that the evidence did not support the conviction for failure to keep records, either before or after the flood (Pet. App. B 8-10). On the other hand, pointing to the fact that Michaels should have had 69 invoices after the flood, and produced only 20, and to petitioner's evasive conduct, the court found that it was "a very reasonable inference, fairly established beyond any reasonable doubt," that some invoices retained by appellants in their possession after the flood were knowingly not produced for inspection (Pet. App. B 9, 10-11). The court accordingly reversed the convictions on count II and affirmed the convictions on count I.

ARGUMENT

1. The disposition of the case by the court of appeals was in accord with the remand by this Court

which directed a consideration of the sufficiency of the evidence. Petitioners now argue that the evidence was sufficient to show that they kept no records—and are therefore guilty under count II, but innocent of count I. The defense testimony at the trial, including the testimony of Michaels was, however, to the contrary, and their motion for judgment of acquittal argued to the contrary. They can scarcely complain that the court, on reexamination of the record, found that the government had not offered sufficient evidence to rebut their affirmative testimony that they did keep records which, for the most part, were destroyed by the flood.

There was ample evidence to show that petitioners knowingly failed to produce records. After a delay of three days petitioners produced thirty seven invoices, only 20 of which were for the period after the flood, although 69 had been received during that time. It could be inferred from Michaels' evasive conduct that the failure to produce the records was intentional. Michaels told the agents on the second day that no additional invoices could be produced until he obtained a key to the office; yet the invoices were finally discovered on the third day outside the office in an area of the basement previously inspected by the agent. Furthermore, as the court of appeals points out (Pet. App. B 9-10), Michaels himself testified that, although the agents asked for all the invoices, he did not look in the drawers where some of the invoices were sometimes kept. There is thus no occasion for the Court to review the sufficiency of the evidence to establish count II.

2. We do not understand the claim of plain error in the instructions to be within the scope of either the remand or petitioners' contentions in the court below. The government's position on this question is fully stated in our brief in opposition to the first petition for certiorari, No. 571, O.T. 1963. As we there pointed out, the jury was charged that petitioners were to be acquitted unless they "knowingly failed and refused to produce" the records (Tr. 251-253). There was no attempt to suggest that the statute imposes criminal liability regardless of intent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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